UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SEARS, ROEBUCK AND CO.

Employer

and Case 19-RC-13997

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, GENERAL TEAMSTERS LOCAL 959, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION AND ORDER SETTING ASIDE ELECTION

Pursuant to a Decision and Direction of Election issued August 29, 2000, an election by secret ballot was conducted on October 19, 2000, among the employees in the following appropriate collective bargaining unit:

> All technicians and support employees, including parts and sales employees, administratively attached to the Employer's Fairbanks and Anchorage, Alaska, branches; but excluding all office clerical employees, and guards and supervisors as defined by the Act.

Upon the conclusion of the election, a tally of ballots was served upon the parties, setting forth the following results:

Approximate number of eligible voters	40
Void ballots	2
Votes cast for Petitioner	17
Votes cast against participating labor organization	18
Valid votes counted	35
Challenged ballots	3
Valid votes counted plus challenged ballots	38

The challenged ballots were sufficient in number to affect the results of the election. After a preliminary investigation conducted by the Regional Director, the parties agreed as to the eligibility to vote in the election of the individuals casting challenged ballots. A revised tally of ballots issued on November 2, 2000, setting forth the following results:

Approximate number of eligible voters	40
Void ballots	2
Votes cast for Petitioner	18
Votes cast against participating labor organization	20
Valid votes counted	38
Challenged ballots	0
Valid votes counted plus challenged ballots	38

On October 24, 2000, Petitioner had filed timely objections to conduct affecting the results of the election. The objections were served upon the other parties. The objections in their entirety alleged that:

1. Between September 6 and 12, 2000, Sears Roebuck and Co., through its agent and representative, Troy Fee, informed employees that if Teamsters Local 959 won the election, they would not receive their regularly scheduled annual wage increases. Such statements were made to threaten, intimidate, and scare employees with loss of their regularly scheduled annual wage increases if they voted in favor of representation by Teamsters Local 959.

2. On or about September 23, 2000, Sears Roebuck and Co. mailed to its employees a copy of the official NLRB ballot, with the "NO" box checked. The ballot mailed to the employees does not clearly identify Sears Roebuck and Co. as the source of the ballot. Such conduct by Sears caused employees to believe that the NLRB supported a "NO" vote on representation by the Petitioner.

On November 3, 2000, the Regional Director issued a Notice of Hearing. The document advised the parties that the Hearing Officer was directed to prepare and serve on the parties a Report on Objections containing resolutions of credibility and recommendations to the Regional Director as to the disposition of the objections. Pursuant thereto, a hearing was conducted before Hearing Officer Miriam C. Delgado on November 27 and 28, 2000. The parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues, and to make oral argument at the conclusion of the hearing.

On December 29, 2000, the Hearing Officer issued her Report on Objections in which she made findings of fact, conclusions of law, and recommended that the objections be sustained and that the election be set aside and a second election conducted.

On January 16, 2001, the Employer filed exceptions to the Hearing Officer's Report with respect to her recommendations that the objections be sustained.

I have reviewed the Hearing Officer's rulings made at hearing and find that they are free from prejudicial error. I have also carefully considered the Hearing Officer's Report, the Employer's exceptions, and the entire record in the proceeding.[1] I hereby adopt the Hearing Officer's findings and conclusions to the extent consistent herewith.

Objection No. 1

The events underlying this Objection occurred in two meetings conducted by the Employer during the election campaign. In the meetings, Troy Fee, the Employer's Labor Relations Manager, addressed the unit employees. In the first meeting, Fee told the employees that if the Union won the election, that thereafter all wages and benefits would be frozen. Employees Barry Boothe and David Philbrick were expecting to receive merit pay increases in December and November, respectively. Boothe testified that in the meeting he asked Fee if he would be getting his raise in December, and that Fee told him "No." Philbrick testified that he

[1] Petitioner waived the right to file a reply brief to the Employer's exceptions.

also asked Fee if he would be getting his raise in November, and Fee told him "No." Fee himself testified as follows:[2]

> A The question was asked whether wage increases would be received if the union was voted in after the election.
>
> Q And what, if anything, did you say?
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> A We'd talked about -- I believe Mr. Boothe brought up the specific date of himself receiving a wage increase in October and I told him that through my experience in negotiating contracts and -- and different elections that I'd been in that they typically do not receive the wage increase because it's a -- it's a collective bargaining aspect where we -- the company and the union negotiates wages, benefits, and working conditions and that's what the union -- those are the three things that the union negotiates with the company is your pay raises, your working conditions, and your benefits.
>
> Q Was there any statement to the effect that they would be frozen pending the outcome of negotiations?
>
> A There was a statement made that the -- the wage increases -- I had not seen wage increases in my experience, merit increases been given, during negotiations of contracts when the company's negotiating wages with associates. Or with the union for associates. [Emphasis added.]
>
> Q Okay. And do you remember Mr. Philbrick making any statements or asking any questions relative to his situation?
>
> A I do. Mr. Philbrick.....
>
> Q What do you remember about that?
>
> A He -- he was argumentative, he was upset about the fact that his merit increase, he might -- he might not receive his merit increase if the union is voted in, being unfair and that he was being -- almost to the point of where he was being singled out is the way I believe he phrased it.
>
> Q And what was your response?
>
> A My response was that the company is not singling anyone out, it just has to do with the process of if a union's voted in collective bargaining, and wages could go up, could stay the same, or could go down, and that's what a union does is they negotiate your wages, your benefits, and your working conditions.
>
> Q Did you ever tell any of the employees at that meeting or at any other meeting that they would lose their merit increases if a union got in?
>
> A I didn't specifically say you're going to lose your merit increases, I did tell them that they would be negotiated.

In the second meeting with the employees, Fee used an overhead projector to present a Board case, *Mantrose-Haeuser Company*, 306 NLRB 377 (1992), as a means of demonstrating to the employees that his statement in the earlier meeting that wages and benefits would be frozen after the election, as they would be subject to negotiation, was not an unlawful statement. Fee testified that in addition to presenting the Board case, he told the employees that:

[2] The Hearing Officer credited the employee testimony when at odds with Fee's. I find no basis to overturn that finding.

> And again I stated that I did not have any intention to threaten the associates in the previous meeting, the intention was to make them understand that by voting a union in you're voting in someone to negotiate wages, benefits, and working conditions for you. And in my experience in all of the contracts I've been involved in there has been an increase, but it has been across the board increase, it has never been specifically where we sit down and negotiate for one individual's raise and then the next individual's raise and then the next individual's raise and so on and so on of the associates within the collective bargaining unit.

It is undisputed that the Employer has a long established past practice of granting yearly merit wage increases to employees on their "anniversary" dates (as defined). The hearing officer found that the amount of the wage increase was fixed, rather than discretionary. The evidence shows that wage increases are automatically granted on the anniversary date, based upon the employee's score in the annual appraisal. That score is compared to a company chart to determine the percentage increase. Nonetheless, the Employer argues that the amounts are discretionary because they are based upon the individual employee's job performance as determined by management. There is no evidence that the relationship between performance and score changes from year to year. In any event, even where an employer has an established past practice of granting merit increases that are fixed as to timing but discretionary as to amount, it may not discontinue the timing element without bargaining to agreement or impasse with the union *as part of the overall negotiations*. *Lamonts Apparel, Inc.,* 317 NLRB 286 (1995*); Harrison Ready-Mix Concrete*, 316 NLRB 242 (1995); *Daily News of Los Angeles*, 315 NLRB 1236 (1994). Moreover, even if the timing is fixed, but the amounts are discretionary, the Employer must offer to bargain about the amounts of raises that fall due *during* the bargaining process. This will involve bargaining about the discretionary amount to give an individual employee at his fixed raise due-date. Bargaining over increases that become due during the overall negotiations must continue until an agreement or impasse arises on the overall agreement. Thus, an employer may not just discontinue a practice of granting merit increases during the period of collective bargaining. Here, had Petitioner prevailed in the election conducted on October 19, 2000, the Employer would have been obliged to continue its past practice with respect to merit increases not only with respect to those few employees who were due for such increases in the closing months of 2000, but also with respect to those employees whose anniversary dates for their merit increases would be occurring in 2001 and beyond, if necessary, until the overall bargaining process had been concluded.[3]

Clearly, by the credited testimony about what was said at the "first September meeting", the Employer told employees, bluntly, they would not continue to receive such increases once the Union was certified.

The Employer contends that unlawful or not, Fee's statements were cured by Fee's later presentation of the Board's findings in the *Mantrose-Haeuser*[4] case, and Fee's statements to employees that future wage increases would be subject to negotiations with the Union.

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[3] In its brief in support of its exceptions, the Employer argues that only those few employees whose anniversary dates fell between the date of the election and the end of 2000 could have been affected by any statements made by Fee, because "Any increases for the year 2001 would be subject to negotiation because the increase amounts for that year had not yet been determined." This contention is, of course, contrary to the Board's holding in *Lamonts*, supra, and *Daily News*, supra.

[4] In the *Mantrose-Haeuser* case, the Board found that the employer's statement that wages and benefits would remain "frozen" during the pendancy of negotiations implied only that wages and benefits would not change, and that the employer's conduct was consistent with such interpretation. Further, the employer

However, Fee neglected to tell the employees that during the pendancy of any negotiations, the Employer would be continuing its past practice of granting merit increases on the employees' anniversary dates, an omission which can fairly be said to leave the employees with the impression that they would not receive any wage increases until negotiations had been completed. Indeed, Fee himself testified that he told the employees that, in his experience, he had not seen "merit increases been given during negotiations of contracts when the company's negotiating wages with associates;" and further testified that, "I didn't specifically say you're going to lose your merit increases, I did tell them that they would be negotiated."

I do not find that the blunt assertions that the Employer would discontinue wage increases was "cured" by the presentation of the *Mantrose-Haeuser* case, or by any accompanying statements made by Fee. The most that Fee said was that in his experience it was unlikely that a union contract (or perhaps a Sear's contract) would contain provisions for merit increases. Fee did not tell the employees that the Employer would continue its past practice with respect to merit increases during negotiations; indeed, he left employees with the prior threat/promise/statement that it would *not* pay interim merit increases; and a prediction they would likely not appear in any collective bargaining agreement either. Thus, in the employees' view, if they chose the Union, they could anticipate that while they might benefit from unionization by receiving negotiated wage increases at some future time, but they would definitely also have to swallow the bitter pill of not receiving the customary merit increases on their anniversary dates in the interim.

I note in particular, that while Boothe and Philbreck were told originally, in the presence of fellow employees, in no uncertain terms, that they would not get their scheduled raises, they were *not* told specifically in the alleged "cure" meeting that they surely would. The Employer could easily have repudiated its earlier clear "no" with an equally clear, unmistakable "yes!" Instead they were given a variety of bafflegab which did not *clearly* inform employees what the Employer intended "freeze" to mean, and which did not clearly distinguish between raises coming due *during* bargaining, and what the wage structure might be after full bargaining. It would have been easy to do so. Fee either did not understand the difference himself, or deliberately chose not to revise his original statements in a clear manner--he only muddied the waters further.

Therefore, I shall sustain Petitioner's Objection No. 1.

Objection No. 2

This objection concerns a facsimile ballot mailed by the Employer to employees, marked with an "X" in the "No" box.

The Board's Notice of Election in this case specifically states, in large, bold lettering:

> WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT

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had a past practice of granting a Christmas bonus and annual merit increases in December, and a high management official told the employees that the amounts of the bonus and merit increases were subject to negotiation, thus assuring the employees that bonuses and merit increases would continue.

THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

The Board and the courts have found that such language on Notices of Election--which became standard after the *SDC* decision--precludes a reasonable impression that an "X" marking in the "Yes" or "No" box on any mock ballot distributed during an election campaign emanates from the Board. *Brookville Healthcare Center,* 312 NLRB 594 (1993); *Comcast Cablevision of New Haven*, 325 NLRB 833 (1998); *Kwik Care Ltd.,* 82 F.3d 1122 (D.C. Cir., 1996). . In analyzing the document at issue in accordance with the test in *SDC Investment*, 274 NLRB 556 (1985), the hearing officer overlooked a subsequent change of Board policy.

Accordingly, I find that Petitioner's Objection No. 2 lacks merit, and I shall overrule it.

Conclusion

Having reviewed the Hearing Officer's Report and the entire record in this matter, I hereby affirm the Hearing Officer's rulings. I have modified her findings and conclusions as set forth above, and I have concluded that:

Objection No. 1 is meritorious and is hereby sustained.

Objection No. 2 lacks merit and is hereby overruled.

ORDER

IT IS HEREBY ORDERED that, inasmuch as I have above sustained Petitioner's Objection No. 1, the election conducted on October 19, 2000 in this matter is hereby set aside, and a second election shall be conducted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 2, 2001.

DATED at Seattle, Washington, this 19th day of January, 2001.

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